In The

Supreme Court of the United States

No. 78-525

WILMORITE, INC., FAYETTEVILLE PLAZA, INC. AND JAMES P. WILMOT, d/b/a FAYETTEVILLE MALL, *Petitioners,*

— *v.* —

EAGAN REAL ESTATE, INC., EAGAN REAL ESTATE MANAGEMENT CORP., EAGAN REAL ESTATE, LEO T. EAGAN, WILLIAM EAGAN, EDWARD EAGAN, KIMBROOK REALTY, KIMBROOK CORP., CFB DEVELOPMENT CORP., CAMPERLINO & FATTI BUILDERS, INC., FRANK FATTI, WILLIAM J. CAMPERLINO, WILLIAM A. BARGABOS, PYRAMID DEVELOPMENT, INC., PYRAMID BROKERAGE COMPANY, INC., MICHAEL FALCONE, ALLIED STORES CORPORATION, DEY BROTHERS AND CO., INC., WINMAR COMPANY, INC., BARNEY DEASY, PAUL D. LONERGAN, KATHERINE M. SHEA, JOHN MURPHY, EARL OOT, ROGER SMITH, ARTHUR REED AND DAVID C. MURRAY, *Respondents.*

KIMBROOK RESPONDENTS' BRIEF IN OPPOSITION TO PETITIONERS' PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MARIO D'ARRIGO
7145 Henry Clay Blvd.
Liverpool, New York 13088
(315) 457-5340

Counsel for Respondents:
Kimbrook Realty
Frank Fatti
William A. Bargabos
William J. Camperlino
Camperlino & Fatti Builders, Inc.
CFB Development Corp.

URCIUOLI & COVINO

TABLE OF CONTENTS

Table of Authorities:

In The

Supreme Court of the United States

No. 78-525

WILMORITE, INC., FAYETTEVILLE PLAZA, INC. AND JAMES P. WILMOT, d/b/a FAYETTEVILLE MALL, *Petitioners,*

— *v.* —

EAGAN REAL ESTATE, INC., EAGAN REAL ESTATE MANAGEMENT CORP., EAGAN REAL ESTATE, LEO T. EAGAN, WILLIAM EAGAN, EDWARD EAGAN, KIMBROOK REALTY, KIMBROOK CORP., CFB DEVELOPMENT CORP., CAMPERLINO & FATTI BUILDERS, INC., FRANK FATTI, WILLIAM J. CAMPERLINO, WILLIAM A. BARGABOS, PYRAMID DEVELOPMENT, INC., PYRAMID BROKERAGE COMPANY, INC., MICHAEL FALCONE, ALLIED STORES CORPORATION, DEY BROTHERS AND CO., INC., WINMAR COMPANY, INC., BARNEY DEASY, PAUL D. LONERGAN, KATHERINE M. SHEA, JOHN MURPHY, EARL OOT, ROGER SMITH, ARTHUR REED AND DAVID C. MURRAY, *Respondents.*

KIMBROOK RESPONDENTS' BRIEF IN OPPOSITION TO PETITIONERS' PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Respondents Kimbrook Realty, Frank Fatti, William A. Bargabos, William J. Camperlino, Camperlino & Fatti Builders, Inc. and CFB Development Corp., referred to as the Kimbrook respondents, omit from this brief reference to opinions below, and the jurisdictional statement as permitted by U.S. Sup. Ct. Rule 40(3), 28 U.S.C.

QUESTIONS PRESENTED

1. Whether judicial and administrative opposition to zone changes, brought by and in the name of parties in interest, exposes to antitrust liability persons who instigate, support, and finance such opposition for anticompetitive purposes.

2. Whether instigating, supporting, and financing judicial opposition to zone changes by parties in interest, in their own name for anticompetitive purposes, exposes such parties in interest to antitrust liability.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

In addition to the Statutes and Constitutional provisions stated in the Petition for a Writ, the case involves §1025 of the New York Civil Practice Law and Rules:

> §1025 Partnerships and unincorporated associations.
>
> Two or more persons conducting a business as a partnership may sue or be sued in the partnership name, and actions may be brought by or against the president or treasurer of an unincorporated association on behalf of the association in accordance with the provisions of the general associations law.

STATEMENT OF THE CASE

Respondent Kimbrook Realty, Frank Fatti, William A. Bargabos, William J. Camperlino, Camperlino & Fatti Builders, Inc. and CFB Development Corp. (the Kimbrook respondents) deem it necessary to submit a restatement of the case due to certain omissions in the petitioners' statement of the case with respect to the conduct related to the Fayetteville Mall and the proposed Great Northern Mall.

1. Fayetteville Mall

In June of 1965, petitioners, through Suburban Heights Development Corp., petitioned the Town of Manlius for a zone change for Andrea Acres, the site where petitioners planned to construct a regional shopping center. In January, 1967 the Manlius Town Board amended its zoning ordinance to create a regional shopping district classification, and Andrea Acres, where petitioners' Fayetteville Mall now stands, was rezoned to that classification.

Certain Eagan respondents owned and operated Shoppingtown, a regional shopping center located approximately two miles from Andrea Acres. The two centers would compete for tenants and customers.

During the period petitioners were seeking the zone change, certain Eagan respondents, and others, allegedly "sought to and did obstruct the passage of the amendment" by instigating and organizing opposition by local merchants and homeowners, including retaining expert witnesses to appear on the homeowners' behalf at public hearings and financing legal proceedings on their behalf; creating "adverse publicity"; and attempting to influence Manlius Town officials by other than "authorized legal proceedings."

Petitioners claim that, after the rezoning of Andrea Acres, certain Eagan respondents and others, induced "neighboring residential property owners" to bring litigation challenging the amendment. Said respondents organized and financed this litigation for their own ends. Although successful at trial and in the Appellate Division, the challenge was ultimately dismissed by the Court of Appeals in a 4 to 2 decision.*

2. The Great Northern Mall

On February 23, 1976, acting on petitioners' application, the Clay Town Board changed the zoning of the site of the proposed Great Northern Mall from A-1 (agriculture, residential and other non-commercial use) to C-4 shopping district. Prior to that date, the town had rejected an application by respondent Kimbrook Realty for a 23 acre commercial site, being part of a large Planned Unit Development known as Kimbrook PUD, owned and operated by Kimbrook Realty, and located some two miles from the proposed Great Northern Mall.

---

*_Albright_ v. _Town of Manlius_, 34 A.D.2d 419, 312 N.Y.S. 2d 13 (4th Dep't 1970); _Albright_ v. _Town of Manlius_, 28 N.Y. 2d 108, 320 N.Y.S. 2d 50 (1971).

Kimbrook Realty is a New York partnership made up of respondents Fatti, Bargabos, Camperlino and Kimbrook Corp. The corporate partner is alleged to be a New York corporation whose activities are directed by the Eagans or the Eagan Interests by reason of the ownership of a controlling interest in said corporation by one or more of the parties comprising said respondents. As stated in the District Court's memorandum decision (A.6, fn 4, Appendix to Petition), "[a] group of defendants bridges the Eagan and Kimbrook groups. Kimbrook Corp. is a partner in Kimbrook Realty which in turn operates the Kimbrook PUD. Defendants Paul D. Lonergan and Katherine M. Shea are officers of Kimbrook Corp. and also are employees of one of the Eagan interests. Through this chain, the Eagans allegedly control the Kimbrook defendants." (It is noted that respondent Kimbrook Corp. is not one of the Kimbrook respondents on whose behalf this brief is submitted.) Moreover, the individual respondents, Fatti, Bargabos and Camperlino are shareholders and/or officers of respondent CFB Development Corp., an operator and developer of the Kimbrook PUD; and respondents Fatti and Camperlino are shareholders and/or officers of respondent Camperlino & Fatti Builders, Inc.

On March 23, 1976, respondent Kimbrook Realty commenced a declaratory judgment action in Supreme Court, State of New York, entitled *Kimbrook Realty* v. *The Town of Clay, et al.*, seeking to have declared invalid and void the zone change for the Great Northern Mall. In addition, on June 16, 1976, respondent Kimbrook Realty commenced an Article 78 Proceeding under the New York Civil Practice Law and Rules seeking to reverse and annul the Referral Recommendation Notice of the Onondaga County Planning Board, and the Resolution of the Town Board of the Town of Clay by which the Great Northern Mall zoning amendment was enacted. This action was entitled *Kimbrook Realty* v. *Onondaga County Planning Board, The Town of Clay and Wilmorite, Inc. (Intervenor)*, and was dismissed by the State Supreme Court on December 27, 1976.

Both Kimbrook Realty proceedings were grounded on the same set of circumstances and at least one of the petitioners was a party to both proceedings.

The declaratory judgment action was terminated on July 26, 1977 by respondent Kimbrook Realty "by an order of discontinuance with prejudice on motion of Kimbrook. Kimbrook moved for such disposition after the town board had granted it relief on its application for a change of zone permitting a shopping center within its Planned Unit Development and after the town board had passed a further resolution in connection with the change of zone obtained by the plaintiffs. In Kimbrook's view, these actions of the Clay Town Board eliminated its objections to the change of zone granted Wilmorite." District Court Memorandum Decision, A.28, Appendix to Petition (footnote omitted).

Both Kimbrook lawsuits were allegedly financed and organized, in whole or in part, by the Kimbrook respondents, the Eagan respondents (or some of them) and others with the intent of resisting and defeating the Clay zoning amendment. Some of the Eagan respondents operate the Penn Can Mall which is alleged to be a competing regional shopping center to the Great Northern Mall.

The Complaint attributes specified conduct to specified respondents according to the following table (derived from paragraph 108 (v) of the complaint):

TABLE

Fayetteville Mall 1965-1971	Great Northern Mall 1976-June, 1977
The Eagans (3 individual parties)	The Eagans (3 individual parties)
The Eagan Interests (3 business parties)	The Eagan Interests (3 business parties)
Allied Stores	Allied Stores
Dey Brothers	Dey Brothers
Smith	--
Earl Oot	--
Reed	--
Murray	--
--	Pyramid Development
--	Pyramid Brokerage
--	Michael Falcone
--	Kimbrook Realty
--	Kimbrook Corp.
--	CFB Development Corp.
--	Camperlino & Fatti
--	Camperlino
--	Fatti
--	Bargabos
--	Lonergan
--	Shea
--	Murphy
--	Winmar
--	Deasy

THE CAUSE SHOULD NOT BE REVIEWED BY THIS COURT

I

THE SECOND CIRCUIT DECISION IS IN HARMONY WITH THE NOERR - PENNINGTON DOCTRINE.

One who is familiar with the facts wonders whether the questions presented to this Court, as framed by petitioners, relate to the instant case. Assuming *arguendo*, that the questions are answered in the negative, the questions framed would nevertheless appear to exclude a significant number of the respondents, including the Kimbrook respondents, from antitrust

liability, because the presumptions inherent in the framed questions have no application to such respondents. That is, the presumptions are at variance with the facts of the case. Thus, the questions presume a conspiracy and activity among horizontal business competitors. Yet, the named defendants include individuals who are not competitors:

1. David C. Murray (subsequently dropped as a defendant): a homeowner in the vicinity of the Fayetteville Mall site, who "was an organizer and the chairman of an organization . . . [which] opposed the development of the Fayetteville Mall."
2. Roger Smith: an expert witness on the development of regional shopping centers retained as such by some of the respondents with respect to the zoning of the Fayetteville Mall.
3. Arthur Reed: another expert witness retained as such by some of the respondents with respect to the Fayetteville Mall.

The complaint contains no allegations that any of the three individuals is in the real estate development business. Their inclusion as defendants would appear to stem solely from their administrative and judicial opposition to the petitioners' Fayetteville Mall.

The framed questions further presume the instigation of "multiple repetitive zoning lawsuits." Yet the allegations in the complaint are addressed solely to (1) two lawsuits commenced by different groups of local homeowners in March and July, 1967, in opposition to the zoning amendment of the Fayetteville Mall; and (2) two lawsuits commenced by respondent Kimbrook Realty in March and June, 1976, in opposition to the zoning amendment of the Great Northern Mall. It is submitted that the term "repetitive" does not reasonably encompass the occurrence of two incidences separated in time by nine years, within the meaning intended by this Court in *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S.508 (1972).

Perhaps the most critical of the presumption not supported by the facts is that the zoning lawsuits were "in the names and interests of legitimate homeowners, without themselves [the respondents] petitioning and having no cognizable grievance to redress." At the outset it is noted that although the two 1967 lawsuits opposing the zone amendment of the Fayetteville Mall were brought by homeowners, the two 1976 lawsuits brought by respondent Kimbrook Realty opposing the Great Northern Mall zoning were *not* brought by homeowners, but rather by a business entity: a partnership. More significantly, however, the two 1976 lawsuits challenging the zoning amendments for the Great Northern Mall in the Town of Clay were brought by respondent Kimbrook Realty, in its own name, to redress a grievance.

Kimbrook Realty owns and operates the Kimbrook PUD, located some distance from the Great Northern Mall. There are no allegations in the complaint that its standing to maintain the proceeding was ever challenged by Wilmorite, Inc., a party in both proceedings.

New York Civil Practice Law and Rules, §1025, authorize "[t]wo or more persons conducting business as a partnership [to] sue or be sued in the partnership name . . . ." However, §1025 "is permissive in nature and does not mandate such a course." *Arlen of Nanuet, Inc.* v. *State*, 52 Misc.2d 1009, , 277 N.Y.S.2d 560, 563 (1967). Although for purposes of pleading under the New York Civil Practice Law and Rules a partnership may be considered a separate legal entity, "it is not from the standpoint of substantive law an entity separate and apart from the members of the [partnership]." 20 Carmody-Wait 2d §122:5. Thus, the statement that the respondents instigated lawsuits "without themselves petitioning and having no cognizable grievance to redress," is incorrect as a matter of New York substantive law. The Kimbrook Realty proceedings were in substance brought by the individual partners since the cause of action of the partnership is the cause of action of the individual partners. Hence, the allegations that respondents Fatti,

Bargabos, Camperlino, Kimbrook Corp. and others having an interest in the Kimbrook PUD, financed, prosecuted and supported the Kimbrook Realty proceedings, merely overstates their obvious constitutional right to do so.

It is interesting to note that the petitioners' arguments to this Court are devoid of time and space frames. The petitioners attempt to impart to their statements a unity of time and applicability which does not exist under the facts of the case. Without so stating, they confine their arguments to events which occurred between 1965 and 1971 with regard to the Fayetteville Mall zoning. They have very little to say with regard to the Kimbrook Realty lawsuits which challenged the validity of the Great Northern Mall zoning, and which involve the larged number of respondents.* So little, in fact, that the petitioners devoted a six-line paragraph to a discussion of the activities related to the Great Northern Mall (Petition, p. 20.)

The respondents term "repetitive" the two Kimbrook proceedings which they allege are based on the same circumstances and which were brought three months apart under separate provisions of New York law. More significantly, however, the petitioners argue that "[k]ey to the scheme . . . was again concealing the true party in interest from the courts." (Petition, p. 20.) The petitioners' statement is simply not reconcilable with the facts: Kimbrook Realty and its four partners and owners of the Kimbrook PUD, all respondents herein, *were* the parties in interest. As such, even under the narrow legal theories of liability propounded by the petitioners, the conduct attributable to respondents Kimbrook Realty and its four partners falls

*See TABLE of respondents, *supra*, at p. 6. Of the 27 named defendants 8 are alleged to have engaged in activities involving both the Fayetteville Mall and the Great Northern Mall, an additional 4 are alleged to have engaged in activities involving solely the Fayetteville Mall, and an additional 15 are alleged to have engaged in activities involving solely the Great Northern Mall.

under the protective mantle of *Eastern R. R. Presidents Conf.* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), as made applicable to the administrative and judicial branches of government by *California Motor Transport, supra.* As *Noerr* made clear, if the conduct is protected, then the purpose and intent behind such conduct, and its effect on a competitor, are legally irrelevant. It follows that if conduct amounting to petitioning the courts to redress a grievance is protected, and it is such conduct that causes the alleged anticompetitive injury, the support of such conduct by others does not change its character; it is still protected and the malevolent purpose or intent of such others is not legally relevant.

The decision of the Court of Appeals is therefore in harmony with the *Noerr-Pennington* Doctrine and the cause should not be reviewed by this Court.

II

THE LOWER COURTS WHICH HAVE HAD AN OPPORTUNITY TO APPLY THE NOERR-PENNINGTON DOCTRINE ARE IN HARMONY WITH ITS TEACHINGS.

The petitioners cite numerous lower court cases for the unsupported proposition that "the *Noerr* exception remains in a state of confusion and disarray . . . ." (Petition, pp. 24-25.) Yet, the petitioners make no attempt to point out to the Court where the lower courts have gone astray in applying the *Noerr-Pennington* Doctrine. The reasons become apparent upon analysis of the appropriate decisions: the lower courts are remarkably uniform in their application of the doctrine. The cause should therefore not be reviewed by this Court.

CONCLUSION

For the reasons set out above, the cause should not be reviewed by this Court, and the petition should be denied.

Respectfully submitted,

MARIO D'ARRIGO
7145 Henry Clay Boulevard
Liverpool, New York 13088
(315) 457-5340

Counsel for respondents:
Kimbrook Realty
Frank Fatti
William A. Bargabos
William J. Camperlino
Camperlino & Fatti Builders, Inc.
CFB Development Corp.

Urciuoli & Covino